

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DR. TREVOR ALLEN and LISA ALLEN,
husband and wife, individually and as the
natural parents and guardians of AA, CA, and
SA, minor children,

Plaintiffs,

v.

THE STATE OF WASHINGTON, SHELLEY
FELD, JEFFREY S. FRICE, and ANTHONY
T. SHAVER, natural persons in their
individual and official capacity as employees
of the State of Washington, and John and Jane
Does 1 through 25, in their individual and
official capacities as unidentified employees of
the State of Washington,

Defendants.

Case No. C05-5502KLS

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT ON
PLAINTIFFS' § 1983 CLAIMS

This matter comes before the Court on defendants' motion for summary judgment on the federal claims brought by plaintiffs pursuant to 42 U.S.C. § 1983 in their first amended complaint. (Dkt. #30). The parties have consented to have this matter be heard by the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Magistrates Rule 13. Having reviewed defendants' motion, plaintiffs' response thereto and the remaining record, the Court hereby finds and orders as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves a complaint alleging a violation of civil rights brought pursuant to 42 U.S.C. §

1 1983, and certain state tort law claims, including the torts of outrage and negligent and intentional infliction
2 of emotional distress. Plaintiffs' First Amended Complaint, pp. 2-4 (Dkt. #29).

3 A. Mr. Allen's Conviction and Sentence

4 Plaintiff, Trevor Allen, was found guilty of the crime of voyeurism in the Superior Court of the State
5 of Washington, County of Clark, on August 11, 2000. Declaration of Shelley Feld ("Feld Declaration"),
6 Exhibit A. According to the State of Washington Department of Corrections ("DOC") pre-sentence
7 investigation report, in late January, 2000, Mr. Allen entered a neighbor's yard, went to what he "assumed
8 was the bathroom window" in the "'hopes of seeing something,'" "looked through the window," and
9 "observed a woman in a robe who appeared to be getting ready." Id., Exhibit D. Mr. Allen also apparently
10 "related he had done this [sort of thing at that house] no more than two times before." Id.

11 Mr. Allen was sentenced to a total of 107 days in custodial confinement, with credit received for
12 103 days of home confinement, 400 hours of community service, and 36 months of community supervision.
13 Feld Declaration, ¶ 6 and Exhibit C. The community supervision portion of his sentence began on
14 November 25, 2000, and included the following conditions: (a) that he "not commit any like offenses"; (b)
15 that he "not possess or use any pornographic material or equipment of any kind," and "not frequent
16 establishments that provide such materials for view or sale"; and (c) at least twice a year he submit to
17 polygraph examinations at the request of his community corrections officer ("CCO") and/or the prosecuting
18 attorney. Feld Declaration, ¶ 6 and Exhibits A and C. The purpose of the polygraph examinations were to
19 ensure compliance with the conditions of Mr. Allen's community supervision, and the results thereof could
20 then be used by the state in any community supervision revocation hearings. Id.

21 B. Mr. Allen's Polygraph Examination

22 Mr. Allen underwent a polygraph examination performed by Ron W. Yunck on October 8, 2003. Id.,
23 Exhibit F. During a "pre-test interview" conducted prior to the actual examination, Mr. Allen advised Mr.
24 Yunck of the following:

25 I did the following things wrong when I was at the above residence(s):

26 Looked at pornography on the computer – last time = 1 month ago – I was alone at the
27 time – looking at still pictures of naked adult females showing their breasts – before I
28 saw this on the computer I had seen an advertisement on the side of a truck (weightless
sex.com) and I was curious – then when I got home I got on the computer and looked it
up – once I got into the site I entered two pages – I was on the site one minute – I did not
masturbate and not have sexual contact with anyone at the time and not shortly

1 afterwards – this is the only time I have looked at pornography on my home computer[.]

2 Peeped on my neighbor Suzie - Age 40s – last time = July or August 2003 – I was alone
 3 at the time – I was in the upstairs part of my house – peeping through her bedroom
 4 window – this was daylight – I saw her in her pajamas – this was in the morning and she
 5 was reading the newspaper – her pajamas were more like a long shirt and shorts – I
 6 peeped on her for about 2 minutes – I was dressed at the time – I did not expose to her,
 7 not try to and not think about it – I did not masturbate and not have sexual contact with
 anyone at the time and not shortly afterwards – this was the only time I have peeped on
 her and the only time I have attempted to peep on her – I have not peeped and not
 attempted to peep on any other neighbor – to me it was not a peeping experience to me –
 I realized where my mind was going and I got away before it becoming [sic] a peeping
 experience[.]

8 Id., question #002.

9 Mr. Yunck reported that when later questioned during the pre-test interview as to whether he had
 10 looked at anything on or from a computer that was sexual, had attempted to deliberately peep on anyone, or
 11 had peeped on anyone through a window, crack of the door, hole in the wall or while pretending to sleep,
 12 Mr. Allen gave the following answers: “yes” and “refer [sic] prior questions.” Id., question #020, #029-
 13 #030. When asked whether he had deliberately disobeyed his probation officer or therapist and committed
 14 probation or therapy violations, furthermore, Mr. Yunck reported Mr. Allen stated as follows:

15 Refer [sic] prior questions &

16 Scan TV for the sexual things – last time = 1 week ago – I was at home – I was alone at
 17 the time – I did not find anything sexual to me and I have scanned 3-4 times total since
 my last test scanning for sexual things but did not find anything sexual[.]

18 Id., question #006. In addition, at the end of the pre-test interview, Mr. Yunck reported that in answer to
 19 the question as to what was the most serious thing he had done, Mr. Allen stated: “looking at the
 20 pornography site on the internet.” Id., question #061.

21 On the other hand, Mr. Yunck reported that Mr. Allen answered “no” to the question as to whether
 22 he had reported everything to his counselor or probation officer, explaining as follows: “I did not tell them
 23 about peeping on my neighbor – the real reason why I did not tell them about this === I did not think it was
 24 peeping.” Id., question #54. Mr. Yunck further reported that when asked what he had been “seriously
 25 tempted” to, but did not, do, Mr. Allen replied: “scan for sexual things on the computer.” Id., question #56.
 26 Mr. Yunck also reported that Mr. Allen answered “no” when asked whether he deliberately broke the law or
 27 did anything else when he knew it was wrong to do so. Id., question #007-#008.

28 On the polygraph examination itself, Mr. Allen once more answered “no” to the following
 questions: (1) “Since your last test, have you had sexual contact with a minor child?”; (2) “Since your last

1 test, have you deliberately peeped on anyone else?"; and (3) "Since your last test, have you been involved in
2 any other illegal sexual activity?" Feld Declaration, Exhibit F. Mr. Yunck, again opined that, "[b]ased on
3 the psychological responses" produced during the polygraph examination, Mr. Allen was not "attempting
4 deception" in his answers to the above three questions. Id.

5 C. Disputed Facts Regarding the Polygraph Examination

6 In his declaration, Mr. Allen states that during the October 8, 2003 polygraph examination, he told
7 Mr. Yunck that "on one occasion while in the upstairs bedroom" of his home, he saw his neighbor "sitting
8 in her backyard reading a newspaper," that she was wearing pajamas which "covered her completely," and
9 that those pajamas "were not revealing or provocative in any way." Declaration of Trevor Allen ("Allen
10 Declaration"), ¶ 9 (Dkt. #37). Mr. Allen further states that he told Mr. Yunck that he "looked at her for a
11 short period of time," that he could "sense" his "mind was beginning to skip to a dangerous place," and that
12 he thus "quit looking" and "walked away." Id.

13 According to Mr. Allen, he "never used the term 'peep' or 'peeping' or 'peeped' while describing
14 this incident to Mr. Yunck." Id., ¶ 10. He states that at one point during the pre-test interview, he asked Mr.
15 Yunck "to read back" to him "a summary" of the "conversation where he used those terms," and "told him
16 that it was not a 'peeping' incident" and that he "did not agree with the use of those terms." Id. In his own
17 deposition for this case, Mr. Yunck testified that he could not remember specifically without looking at the
18 polygraph examination report whether Mr. Allen had used those terms. Plaintiffs' Statement of Material
19 Facts ("Plaintiffs' Statement"), Exhibit Q (Dkt. #34).

20 With respect to the issue of accessing pornography on his computer, Mr. Allen states that he told
21 Mr. Yunck he "tried to access it," but then he "stopped immediately" when he "realized" he was "crossing
22 over into dangerous and inappropriate conduct." Allen Declaration, ¶ 11. Mr. Allen further states that he
23 "did not view pornography" on his computer, nor did he tell Mr. Yunck that he had done so. Id., ¶ 13.

24 Mr. Allen states that he "did not see Mr. Yunck's transcript of the pretest interview until" after he
25 was arrested for alleged violations of his conditions of community supervision, as set forth below,¹ and that
26 "[t]he only signature" he provided "was before the interview began," which was on a "Statement of
27 Consent" authorizing the release of information contained in his polygraph examination and holding Mr.

28 ¹Mr. Allen does further state, however, that "[o]n the one or two occasions where" Mr. Yunck "went over the transcript"
with me, I made corrections," but it appeared Mr. Yunck "never made them in the transcript itself." Id., ¶ 14.

1 Yunck and his company “harmless and free from any liability.” Id., ¶ 14; see also Feld Declaration, Exhibit
2 F. In his deposition testimony, Mr. Yunck himself confirmed that the above “Statement of Consent” merely
3 allowed him to give Mr. Allen the polygraph examination and let Mr. Allen know to whom his information
4 could be released. Plaintiffs’ Statement, Exhibit P.

5 Mr. Yunck testified that the “Statement of Consent” is presented to the individual being examined
6 before the actual polygraph examination is administered. Id., ¶ P. He further testified that the transcript of
7 the pre-test interview is not reviewed with the individual being examined prior to sending it to the DOC.
8 Id., ¶ R. With respect to Mr. Allen’s own polygraph examination, Mr. Yunck testified that Mr. Allen’s
9 signing of the “Statement of Consent” did not “in any way” constitute an acknowledgment that Mr. Allen
10 agreed with “the accuracy of the pretest interview,” nor did Mr. Yunck tell anyone at the DOC that Mr.
11 Allen’s signing could be interpreted as such. Id. Mr. Yunck also testified that he did not provide Mr. Allen
12 with a copy of the pre-test interview transcript. Id.

13 D. Mr. Allen’s Arrest

14 In her declaration, defendant Shelley Feld states that she was Mr. Allen’s CCO from July 24, 2003,
15 until December 18, 2003. Feld Declaration, ¶ 7. She states that so as “to enforce the terms and conditions”
16 of Mr. Allen’s sentence, she “read records in the DOC file,” the reports of his counselor, the DOC’s pre-
17 sentence investigation report, and “the polygraph examiner’s reports,” and “read and became familiar with”
18 Mr. Allen’s “criminal history and supervised him accordingly,” and Id., ¶¶ 7-8.

19 Defendant Feld states that on October 13, 2003, she received a copy of Mr. Yunck’s October 8,
20 2003 polygraph examination report. Id., ¶ 9. She states that the purpose of the pre-test interview questions
21 posed to Mr. Allen “is to see if the offender discloses conduct that may violate his sentence,” which should
22 then “be provided to the sentencing court.” Id., ¶ 10. She notes that in response to the questions as to
23 whether he had deliberately disobeyed his probation officer or therapist, had committed probation or
24 therapy violations, and had attempted to deliberately peep on anyone, Mr. Allen answered as follows: “yes”
25 and “refer [sic] prior questions.” Id., ¶ 11. In answer to the question as to what was the most serious thing
26 he had done, she further notes plaintiff responded with: “Looking at the pornography site on the internet.”
27 Id.

28 Defendant Feld states that she then conferred with her supervisor, defendant Jeff Frice, on October
17, 2003, a Friday. Id., ¶ 12. They both concluded that Mr. Allen “had admitted [in his pre-test interview]

1 that he had engaged in conduct similar to the conduct for which he was sentenced and which violated the
2 terms and conditions of his sentence,” and that those “admissions” had “created a reasonable suspicion”
3 that he “had violated his sentence.” Id., ¶ 12.

4 In her deposition for this case, defendant Feld testified that she did not personally speak with Mr.
5 Yunck about Mr. Allen’s polygraph examination before going to arrest Mr. Allen. Plaintiffs’ Statement,
6 Exhibit H. She testified that while she understood there was a difference between a pre-test interview and
7 the actual polygraph examination itself, she did not know how the process worked, nor had she ever
8 received any specific training with respect thereto. Id. Defendant Feld further testified that she “made the
9 decision to make an arrest,” because “it was on a Friday,” and because:

10 [C]onsidering the violations -- or allegations that were being presented to me through the
11 polygraph examination, I felt that he needed to be taken into custody immediately for
12 community safety to avoid any possible -- any future criminal behavior, violation
13 behavior.

14 Id., Exhibit L.

15 In his declaration, defendant Frice states that Mr. Allen had been classified by the DOC as “a high
16 risk offender, the second most likely to reoffend.” Declaration of Jeff Frice (“Frice Declaration”), ¶ 3. He
17 states that on October 17, 2003, defendant Feld came into his office with Mr. Allen’s October 8, 2003
18 polygraph report. Id., ¶ 6. As did defendant Feld, defendant Frice states that in that report Mr. Allen
19 “admitted that he had engaged in conduct that” was “prohibited by his judgment and sentence,” and that
20 “[i]n response to direct questions he admitted that he had deliberately peeped on a neighbor and that he had
21 used a computer to access online pornography.” Id.

22 Also as did defendant Feld, defendant Frice felt “[t]hese admissions in the October 8 pre-polygraph
23 interview create[d] a reasonable suspicion that” Mr. Allen “was in violation of his judgment and sentence.”
24 Id., ¶ 7. In his deposition for this case, however, defendant Frice testified that he based his belief that Mr.
25 Allen committed a violation of his judgment and sentence both on the statements that were attributed to
26 him in the pre-test interview report, and on Mr. Allen signing the report “saying that he agreed with what
27 was in there.” Plaintiffs’ Statement, Exhibit B. Defendant Frice further testified that he did not contact Mr.
28 Allen’s therapist or read any of his reports prior to deciding to arrest Mr. Allen. Id., Exhibit F.

As noted above, defendant Feld states in her declaration that because “[i]t was Friday afternoon,”
she and defendant Frice decided Mr. Allen “should be brought into custody and brought before the

1 sentencing court for a violation hearing.” Feld Declaration, ¶ 12. In his declaration, defendant Frice further
2 elaborated why he decided Mr. Allen should be taken into custody:

3 I determined that Allen should be taken into custody because his answers during the
4 polygraph interview led me to believe that he presented a significant risk to public safety.
5 I want to prevent new criminal behavior and protect potential victims. If Allen remained
6 at large and committed a new offense, the DOC would be liable for any injury caused by
7 Allen from the moment that DOC became aware of his potential to reoffend. My
8 decision to arrest Allen was based on DOC’s obligation to protect public safety and
9 DOC’s duty to present this information to the sentencing court so that the court could
10 decide whether to reincarcerate Allen or impose a lesser sanction.

11 Frice Declaration, ¶ 8.

12 Defendant Frice also determined that Mr. Allen’s computer should be “seized and searched for
13 evidence of a parole violation,” and that he should not be asked to report to DOC voluntarily, because that
14 “would have given him the opportunity to erase evidence from the computer or conceal the computer.” Id.,
15 ¶ 11. To that end, defendant Frice directed defendant Feld “to write an order for arrest and detention, a
16 notice of violation, and to take” Mr. Allen “into custody.” Id., ¶ 7. In addition, it was the impression of
17 defendant Tony Shaver, who, as explained below, participated in the arrest of Mr. Allen, that defendant
18 Frice “wanted to make sure that this arrest was done,” and that “he did not want” defendant Feld “talked out
19 of it” by Mr. Allen. Plaintiffs’ Statement, Exhibit U.

20 Defendants Feld and Frice “recruited a team of four DOC personnel,” including both themselves
21 and defendant Shaver. Feld Declaration, ¶ 13; Frice Declaration, ¶ 9. Defendant Feld states that she
22 contacted the local police department and asked them for assistance. Feld Declaration, ¶ 13. The four DOC
23 personnel, along with three local police officers who had “joined the arrest team,” then drove to Mr. Allen’s
24 house. Id. According to defendants Feld and Frice, “[i]t is standard operating procedure to take more than
25 one [DOC] officer to arrest an offender in the community,” and to “ask for assistance from local law
26 enforcement if time and resources permit.” Id.; Frice Declaration, ¶ 9.

27 Defendant Feld states that she previously had not been to Mr. Allen’s house. Feld Declaration, ¶ 14.
28 Prior to going there, defendants Feld and Shaver “were assigned to enter and arrest” Mr. Allen. Id.; Frice
Declaration, ¶ 10. They went to the front door and knocked. Feld Declaration, ¶ 14; Declaration of Anthony
Shaver (“Shaver Declaration”), ¶ 5. The door was opened by a young girl, who turned out to be Mr. Allen’s
daughter, plaintiff AA. Id. Defendant Feld asked plaintiff AA if her father was at home, and she responded
that he was upstairs and asked if she should go get him. Id.

1 Defendants Feld and Shaver then entered the house, and defendant Feld announced themselves by
2 stating: "Department of Corrections." Feld Declaration, ¶ 14; Shaver Declaration, ¶ 6. Defendant Shaver
3 "noticed a stairway to the right," and "moved ahead" of both defendant Feld and plaintiff AA. Shaver
4 Declaration, ¶ 6. Defendant Shaver "went up the stairs," and defendant Feld followed behind him. Id. At
5 the top of the stairs, they saw Mr. Allen "at the far end" of a narrow hallway. Feld Declaration, ¶ 15; Shaver
6 Declaration, ¶ 7. Both defendants state that defendant Shaver told Mr. Allen he was under "under arrest"
7 and directed him "to turn around and put his hands behind his back." Id.

8 According to defendant Shaver, Mr. Allen asked him "why," and he responded by repeating his
9 "instructions two or three times." Shaver Declaration, ¶ 7. Mr. Allen then "complied by turning around in
10 place and putting his hands behind his back." Id.; Feld Declaration, ¶15. Defendant Shaver then
11 approached Mr. Allen, placed him in handcuffs, escorted him downstairs, and "took him to a chair on the
12 front porch." Feld Declaration, ¶ 15; Shaver Declaration, ¶¶ 7-8. Defendant Feld then transported Mr. Allen
13 to the Clark County jail, "where he was booked and held for the weekend." Feld Declaration, ¶ 16.

14 Defendant Shaver states that during the arrest of Mr. Allen, he "was wearing a DOC issued handgun
15 in a holster on his right side," which was "not concealed." Shaver Declaration, ¶ 4. According to a DOC
16 policy directive, DOC "[s]taff who choose to carry firearms shall carry their firearms at all times while in the
17 performance of their official field duties," "[f]irearms shall not be used to effect an arrest" unless the CCO
18 "perceives a threat of great bodily harm or death," and DOC "[s]taff shall only use the level of force that is
19 necessary to control a situation." Id.; see also Plaintiffs' Statement, Exhibit CC, Field Directive re: Firearms,
20 DOC 200.460.

21 Defendant Shaver states that "[b]efore, during and after the arrest," he "had no reason to believe
22 that" Mr. Allen "would resist arrest or present a risk of flight." Shaver Declaration, ¶ 5. He further states
23 that he "did not use any force" in arresting Mr. Allen, that he "did not need to use any force" to do so, and
24 that he "did not unholster" his weapon "during the arrest." Id., ¶ 9. In his declaration, defendant Frice also
25 states that "[a]t no time during the whole arrest was any force used," nor did Mr. Allen "complain about any
26 force having been used or about any weapon being drawn." Frice Declaration, ¶ 12.

27 Defendant Feld testified in her deposition that to the extent that defendant Shaver "was out of" her
28 "line of sight at any given time" when they went upstairs to arrest Mr. Allen, it might "have only been a few
seconds." Plaintiffs' Statement, Exhibit M. However, defendant Feld testified that at no time did she see

1 defendant Shaver take his gun out of his holster. Id. While defendant Feld did not recall if defendant Shaver
2 at any time put his hand on his gun, she testified he could have done so. Id. In her declaration though, she
3 again states that she was “directly behind” defendant Shaver, that “[a]t no time did” she “observe any force
4 being used” or “any weapon drawn” by him, and that if he “had drawn his weapon,” she “would have seen
5 it.” Feld Declaration, ¶ 19.

6 Defendant Feld did not remember if plaintiff AA was behind her or in front of her when they went
7 up the stairs. Plaintiffs’ Statement, Exhibit M. In her own deposition for this case, plaintiff AA testified that
8 after she “walked a few steps into the [upstairs] hallway . . . [o]ne of the men in uniform walked” past her
9 and arrested her father. Id., Exhibit X. She further testified that this man had followed her up the stairs. Id.
10 However, she also testified that she never saw anyone with a gun in his or her hand, and that, while she did
11 see a gun that day, it was in the “pocket” of the man who had followed her up the stairs. Id.

12 In his declaration, Mr. Allen states that as he was standing outside of his bedroom at the end of the
13 upstairs hallway talking to his wife, he saw plaintiff AA in the hallway and “a large man” behind her, who
14 turned out to be defendant Shaver. Allen Declaration, ¶ 20-21. Mr. Allen states that defendant Shaver was
15 “holding a pistol” in his right hand, and that he “was holding it down and partially behind” plaintiff AA. Id.,
16 ¶ 21. Mr. Allen further states that although “[i]t was hidden somewhat, . . . there was no doubt” in his mind
17 “that he had a gun in his hand.” Id., ¶ 21.

18 Mr. Allen states that he “heard someone yell something about ‘Department of Corrections!,’” and
19 that defendant Shaver was “yelling orders” at him “to turn around and put” his hands behind his back. Id.
20 Mr. Allen states that as he “began to comply with his orders,” he saw defendant Shaver “put his gun in the
21 holster, grab the handcuffs, and move around” plaintiff AA “to her right.” Id. As related by defendants Feld
22 and Shaver above, Mr. Allen states that he then was handcuffed by defendant Shaver, taken downstairs by
23 him, and brought outside to sit on his front porch. Id. He states that he was transported to the Clark County
24 Jail, where he “was held until the following Thursday,” October, 23, 2003. Id., ¶ 22.

25 E. Mr. Allen’s Violation Hearing

26 On October 23, 2003, defendant Feld filed a “Notice of Violation” report with the Clark County
27 Superior Court, in which she stated that Mr. Allen’s period of community supervision was due to terminate
28 on November 22, 2003, but that he had violated the conditions of his supervision by: (1) “[c]ommitting a
like offense by peeping at a neighbor sometime during the months of July and/or August as disclosed in the

1 polygraph on 10/08/03"; and (2) "[v]iewing pornography as disclosed in the polygraph on 10/08/03." Feld
2 Declaration, Exhibit G, p. 1. That report also had been "[a]pproved" by defendant Frice prior to its filing
3 with the Clark County Superior Court. Id., p. 3.

4 Defendant Feld stated in the violation report that Mr. Allen had disclosed during his October 8,
5 2003 polygraph examination that while he "did not believe" he was "peeping" when he watched his
6 neighbor "for approximately two minutes" in July and/or August 2003, he "admitted that he was aware of
7 where his mind was going during the incident." Id., p. 2. Defendant Feld also stated that Mr. Allen's
8 "original offense of voyeurism involved similar behaviors of watching neighbors in their home." Id.

9 In addition, defendant Feld stated that Mr. Allen also had disclosed in his polygraph examination
10 that he "had looked at pornography on the computer." Id. She stated, furthermore, that a forensic analysis of
11 Mr. Allen's computer revealed that he viewed a website called weightlessex.com "for approximately two
12 minutes," which was "mirrored with another website, bungeesex.com, which it would appear that" he had
13 "typed in" that web address in order to go there. Id.

14 Defendant Feld concluded her report as follows:

15 Allen has been on supervision for 35 months. He has complied with specific conditions
16 regarding reporting and attending treatment. In fact he will be completed with treatment
17 before his supervision ends in November 2003. On the surface it would appear that
18 Allen has done well on supervision, however these recent disclosures during his
19 polygraph are a concern for the Department of Corrections. Allen has self-reported these
20 behaviors and it appears that he is recognizing that these behaviors are not appropriate.
21 Nonetheless, these behaviors indicate that Allen is possibly in a pattern of behaviors that
could result in a new victim. In his polygraph on 05/27/03,² Allen disclosed that he had
fantasized about past peeping episodes. During both the polygraphs on 05/27/03, and the
more recent one conducted on 10/08/03, Allen disclosed that he had scanned the
television for sexually explicit material on several occasions. All these high-risk
behaviors are violations of Allen's conditions of supervision, and can lead to his
committing another offense.

22 Id. She recommended Mr. Allen serve "10 days per violation for a total of 20 days jail." Id., p. 3.

23 A violation hearing before the Clark County Superior Court was set for December 18, 2003. Feld
24 Declaration, ¶ 17. In the meantime, Mr. Allen was released on his own recognizance without bail. Id. It
25 appears the prosecuting attorney also decided to dismiss the violation regarding Mr. Allen's alleged use of
26 his computer to view pornography, because the forensic analysis of the computer discussed above showed
27 that he "had tried to access" the websites weightlessex.com and bungeesex.com, but his "internet service
28

²This polygraph is not contained in the record before the Court.

1 provider blocked access beyond the home page of each site.”³ Frice Declaration, ¶ 13; Feld Declaration, ¶
2 18; Plaintiffs’ Statement, Exhibit Z.

3 At the violation hearing, the Clark County Superior Court determined Mr. Allen “had not engaged
4 in any new voyeurism conduct and dismissed the voyeurism violation,” and it released him “immediately
5 from further [community] supervision.” Feld Declaration, ¶ 18 and Exhibit H; Allen Declaration, ¶ 23. The
6 trial court’s decision appears to have been based on evidence Mr. Allen’s attorney presented to the court
7 “during a private conference,” indicating that it was “not possible for anyone to see inside the neighbor’s
8 bedroom from the Allen’s residence.” Feld Declaration, ¶ 18; Plaintiffs’ Statement, Exhibit AA. Mr. Allen
9 further states that during the hearing, the trial court “expressed concern” to defendant Feld “about the
10 amount of force that was used in arresting” him. Allen Declaration, ¶ 23.

11 F. Procedural History in This Case

12 Defendants filed their motion for summary judgment on plaintiffs’ section 1983 claims on July 18,
13 2006, arguing that: (1) plaintiffs’ Fifth, Eighth and Fourteenth Amendments claims and their claims against
14 the State of Washington should be dismissed; (2) defendants Feld, Frice and Shaver are entitled to qualified
15 immunity with respect to plaintiffs’ Fourth Amendment claims of unlawful arrest and excessive use of
16 force; and (3) the federal claims made by plaintiffs Lisa Allen, AA, CA and SA should be dismissed. (Dkt.
17 #30). Plaintiffs have filed a response to defendants’ motion (Dkt. #38)⁴ and defendants have replied thereto.
18 (Dkt. #40). Defendants’ motion for summary judgment on plaintiffs’ section 1983 claims, therefore, is now
19 ripe for consideration.

20 DISCUSSION

21 I. Standard of Review

22 Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that there is no
23 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
24 Federal Rule of Civil Procedure (“Fed. R. Civ. P.”) 56(c). In deciding whether summary judgment should
25

26 ³The Court notes though that the attempted access identified through the forensic analysis occurred on October 13, 2003,
27 some five days after the polygraph was administered. Plaintiffs’ Statement, Exhibit Z.

28 ⁴Plaintiffs filed a motion for continuance of the original noting date for consideration of defendants’ motion from August
18, 2006, to August 25, 2006, due to an inability to file their response on time. (Dkt. #32). Defendants have not objected to the
motion for continuance. Accordingly, plaintiffs’ motion for continuance (Dkt. #32) hereby is GRANTED.

1 be granted, the Court must view the record in the light most favorable to the nonmoving party and indulge
 2 all inferences favorable to that party. Fed. R. Civ. P. 56(c) and (e). When a summary judgment motion is
 3 supported as provided in Fed. R. Civ. P. 56, an adverse party may not rest upon the mere allegations or
 4 denials of his or her pleading, but that party's response, by affidavits or as otherwise provided in Fed. R.
 5 Civ. P. 56, must set forth specific facts showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e). If
 6 the nonmoving party does not so respond, summary judgment, if appropriate, shall be rendered against that
 7 party. Id.

8 The moving party must demonstrate the absence of a genuine issue of fact for trial. Anderson v.
 9 Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Mere disagreement or the bald assertion that a genuine
 10 issue of material fact exists does not preclude summary judgment. California Architectural Building
 11 Products, Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987). A "material" fact is one
 12 which is "relevant to an element of a claim or defense and whose existence might affect the outcome of the
 13 suit," and the materiality of which is "determined by the substantive law governing the claim." T.W.
 14 Electrical Serv., Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

15 Mere "[d]isputes over irrelevant or unnecessary facts," therefore, "will not preclude a grant of
 16 summary judgment." Id. Rather, the nonmoving party "must produce at least some 'significant probative
 17 evidence tending to support the complaint.'" Id. (quoting Anderson, 477 U.S. at 290); see also California
 18 Architectural Building Products, Inc., 818 F.2d at 1468 ("No longer can it be argued that any disagreement
 19 about a material issue of fact precludes the use of summary judgment."). In other words, the purpose of
 20 summary judgment "is not to replace conclusory allegations of the complaint or answer with conclusory
 21 allegations of an affidavit." Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990).

22 II. Plaintiffs' Claims that Defendants Violated Mr. Allen's Fifth, Eighth and Fourteenth Amendment 23 Rights Are Without Merit

24 In their first amended complaint, plaintiffs allege defendants' actions described above violated Mr.
 25 Allen's Fifth, Eighth and Fourteenth Amendment rights to "due process, equal protection and freedom from
 26 excessive punishment." Plaintiffs' First Amended Complaint, p. 2. Defendants argue these claims must fail,
 27 because all allegations concerning unlawful seizures and excessive use of force, which lie at the heart of this
 28 case, must be analyzed under the Fourth Amendment. The Court agrees.

In reviewing claims of unlawful arrest or seizure or excessive use of force brought under section

1 1983, the Court first must identify “the specific constitutional right allegedly infringed by the challenged
 2 application of force.” Graham v. Connor, 490 U.S. 386, 394 (1989). “The validity of the claim must then be
 3 judged by reference to the specific constitutional standard which governs that right, rather than to some
 4 generalized ‘excessive force’ standard.” Id. Where an excessive force claim “arises in the context of an
 5 arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections
 6 of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons . . . against
 7 unreasonable seizures’ of the person.”⁵ Id.

8 The protections of the Fourth Amendment apply equally with respect to claims of unlawful arrest or
 9 seizure of those not incarcerated. See Albright v. Oliver, 510 U.S. 266, 271-74 (1994) (holding plaintiff’s
 10 claim of unlawful arrest must be judged under Fourth Amendment and not substantive due process); see
 11 also Blackwell v. Barton, 34 F.3d 298, 302 (5th Cir. 1994) (citing to Graham, 490 U.S. 386) (“Although the
 12 present case does not involve a claim of excessive force, the reasoning of *Graham* is equally applicable to
 13 Blackwell’s claim for illegal arrest.”).

14 In certain situations, substantive due process and the Eighth Amendment’s prohibition against cruel
 15 and unusual punishment, rather than or in addition to the Fourth Amendment’s protections, will apply. For
 16 example, in the excessive use of force context, while the issue of whether the Fourth Amendment continues
 17 to provide protection “beyond the point at which arrest ends and pretrial detention begins,” has not yet been
 18 resolved, “[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive
 19 force that amounts to punishment.” Graham, 490 U.S. at 395 n.10. In addition, it is the Eighth Amendment
 20 that “serves as the primary source of substantive protection” for convicted prisoners “where the deliberate
 21 use of force is challenged as excessive and unjustified.” Id. (citation omitted).

22 This case, however, involves the arrest of Mr. Allen in his home. Although he was on community
 23 supervision during the relevant time period at issue here, and thus still subject to the authority of the DOC,
 24 Mr. Allen was not a pretrial detainee, nor do the Eighth Amendment’s protections apply, as that amendment
 25 “is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions.” Whitley
 26

27 ⁵“The Fourth Amendment . . . forbids governmental violation of ‘[t]he right of the people to be secure in their persons,
 28 houses, papers, and effects, against unreasonable searches and seizures.’” Pierce v. Smith, 117 F.3d 866, 872 (5th Cir. 1997). “A
 ‘seizure’ triggering the Fourth Amendment’s protections occurs only when government actors have, “by means of physical force
 or show of authority, . . . in some way restrained the liberty of a citizen.” Graham, 490 U.S. at 395 n.10 (quoting Terry v. Ohio,
 392 U.S. 1, 19 n.16 (1968)).

1 v. Albers, 475 U.S. 312, 327 (1986). In their response to defendants' summary judgment motion, plaintiffs
2 do not contest the assertion that the Eighth Amendment does not apply. Rather, plaintiffs now argue that
3 "the unilateral revocation" of Mr. Allen's release into community supervision "comes within the purview"
4 of the Fourteenth Amendment's procedural due process protections. Plaintiffs' Memorandum in Response
5 to Defendants' Motion for Summary Judgment ("Plaintiffs' Response"), p. 9.

6 That argument, however, is without merit. First, although plaintiffs' do reference the Fourteenth
7 Amendment in their first amended complaint, nowhere therein do they claim that "the unilateral revocation"
8 of Mr. Allen's release violated his procedural due process rights. Second, even if it can reasonably be said
9 that plaintiffs validly raised this issue in their first amended complaint, it appears from the record currently
10 before the Court that Mr. Allen received all of the process he was due concerning his arrest and subsequent
11 community supervision violation hearing.

12 In support of his argument, plaintiff relies on the decision of the United States Supreme Court in
13 Morrissey v. Brewer, 408 U.S. 471 (1972). In that case, the Supreme Court was dealing with the issue of
14 "whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual
15 some opportunity to be heard prior to revoking his parole." Id. at 472. There, two parolees, who had been
16 arrested for violating the conditions of their parole, were placed in jail, had their paroles revoked without
17 first receiving a hearing, and then were recommitted to prison. Id. at 472-74.

18 In remanding the case back to the lower courts, the Supreme Court held that parolees were entitled
19 to receive certain minimum due process procedures before having their paroles revoked, and set forth what
20 those procedures were. For example, the Supreme Court stated that "as promptly as convenient after
21 arrest," a determination, "in the nature of a 'preliminary hearing,'" that reasonable grounds exist "for
22 revocation of parole should be made by someone not directly involved in the case," who "need not be a
23 judicial officer," but merely someone "other than the one who has made the report of parole violations or
24 has recommended revocation," including another parole officer. Id. at 485-86.

25 With respect to the nature of the actual preliminary hearing, the Supreme Court in Morrissey went
26 on to state in relevant part as follows:

27 [T]he parolee should be given notice that the hearing will take place and that its purpose
28 is to determine whether there is probable cause to believe he has committed a parole
violation. The notice should state what parole violations have been alleged. At the
hearing the parolee may appear and speak in his own behalf; he may bring letters,
documents, or individuals who can give relevant information to the hearing officer. On

request of the parolee, [the] person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence.

Id. at 486-87. The Supreme Court also held that “[t]here must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority.” Id. at 487-88. That hearing must “be tendered within a reasonable time after the parolee is taken into custody,” and provide the parolee with the “opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.” Id. at 488.

In this case, Mr. Allen’s first appearance before an uninvolved decision-maker was before the Clark County Superior Court on October 20, 2003, just three days after he was arrested. Feld Declaration, ¶ 17. While the matter was set “over” until October 23, 2003, and then to December 18, 2003 (id.), plaintiff has not shown that he objected to this delay, nor has he claimed a due process violation based on the length of such delay. Indeed, even if plaintiff had made such a claim, it appears that it would fail. See Morrissey, 408 U.S. at 488 (lapse of two months from time parolee is taken into custody and date revocation hearing is held would not appear to be unreasonable). It also appears plaintiff was given every opportunity to be heard and to contest the alleged community supervision violation regarding peeping made against him, as, indeed, his attorney succeeded in having that allegation dismissed.

Instead, plaintiffs’ argument is premised on certain quoted language from the dissent in Morrissey, which argued that “[i]f a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or to a local jail.”⁶ Id. at 497 (Douglas, J., dissenting in part). Needless to say, a dissenting opinion, no matter how persuasive or helpful to a party’s position it may be, is not the Supreme Court’s actual holding, and, as such, does not constitute legal precedent, binding or otherwise. Rather, as discussed above, the only process Mr. Allen was due under Morrissey was proper notice and the opportunity to be heard before an uninvolved decision-maker after his arrest, and there has been no showing that he did not receive such in this case.

III. Plaintiffs’ Claims Against the State of Washington Are Barred by the Eleventh Amendment

Under the Eleventh Amendment to the United States Constitution, a state is not subject to suit by

⁶The dissent went on to state that: “[r]ather, notice of the alleged violation should be given to the parolee and a time set for a hearing.” Id.

1 its own citizens in federal court.⁷ Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). A state agency, as an
 2 arm of the state, is immune from suit in federal court under the Eleventh Amendment as well. Howlett v.
 3 Rose, 496 U.S. 356, 365 (1990); Will v. Michigan Dep't of State Police, 491 U.S. 58, 70 (1989). An
 4 entity that has Eleventh Amendment immunity also is not a "person" within the meaning of 42 U.S.C. §
 5 1983.⁸ Howlett, 496 U.S. at 365.

6 Plaintiffs have named the State of Washington as a defendant in this case. As noted above, however,
 7 a state is immune from suit under the Eleventh Amendment. In addition, the DOC, though not specifically
 8 named as a defendant, is, as an arm of the state itself, also immune from liability in this action. Plaintiffs
 9 counter that the State of Washington should not be found to be immune from liability, because "there are
 10 material factual disputes" as to whether the DOC's "policies and customs led to the violation" of their
 11 rights. Plaintiffs' Response, pp. 10-11. Plaintiffs, however, appear to confuse the issue of state liability with
 12 that of municipal or other local government entity liability.

13 Plaintiff cites to Monell v. Department of Social Services, 436 U.S. 658 (1978), for the proposition
 14 that governmental agencies may be liable under section 1983 when the action alleged to be unconstitutional
 15 was an officially adopted policy or was undertaken pursuant to a custom. The Supreme Court in Monell,
 16 however, specifically held that such was the case only with respect to suits brought against "municipalities
 17 and other local government units." Id. at 690-91. Indeed, the Supreme Court proclaimed in no uncertain
 18 terms that "[o]ur holding today is, of course, limited to local government units which are not considered
 19 part of the State for Eleventh Amendment purposes." Id. at 691 (emphasis added). As the State of
 20 Washington is clearly not a unit of local government, Monell is wholly inapplicable here.⁹

21
 22 ⁷The Eleventh Amendment reads in relevant part: "[t]he Judicial power of the United States shall not be construed to
 23 extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by
 Citizens or Subjects of any Foreign State." U.S. Const. Amend XI.

24 ⁸Section 1983 reads in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or
 25 usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States
 26 or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the
 Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for
 redress." 42 U.S.C. § 1983.

27 ⁹Plaintiff also cites to Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001), for the proposition that a government
 28 entity's failure to train its employees creates section 1983 liability where such failure to train "amounts to a deliberate indifference
 to the rights of persons with whom those employees are likely to come into contact." Plaintiff's Response, p. 11 (quoting Lee, 250
 F.3d at 681). Again, however, as with the Supreme Court's holding in Monell, the Ninth Circuit's holding in Lee is limited to
 municipalities or other local governmental entities. Lastly, plaintiff's reliance on McRorie v. Shimoda, 795 F.2d 780 (9th Cir.

1 IV. The Doctrine of Qualified Immunity

2 Prior to determining whether defendants Feld, Frice and Shaver are entitled to qualified immunity,
3 the Court first must determine if plaintiffs have “alleged the deprivation of an actual constitutional right at
4 all.” Conn v. Gabbert, 526 U.S. 286, 290 (1999). If they have not done so, then the issue of qualified
5 immunity does not come before the Court. Id. at 293. When making this initial determination, however,
6 the Court must view the facts “in the light most favorable to the party asserting the injury.” Saucier v.
7 Katz, 533 U.S. 194, 201 (2001).

8 Under the doctrine of qualified immunity, state officials “performing discretionary functions [are
9 protected] from liability for civil damages insofar as their conduct does not violate clearly established
10 statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald,
11 457 U.S. 800, 818 (1982); Somers v. Thurman, 109 F.3d 614, 617 (9th Cir. 1997). To determine whether a
12 state official is entitled to qualified immunity, the court must perform a two part inquiry. First, the court
13 considers “whether the law governing the official’s conduct was clearly established.” Somers, 109 F.3d at
14 617. If the law was not clearly established at the time, “the official is entitled to immunity from suit.” Id.
15 If the law was so established, the court next asks whether “under that law, a reasonable official would have
16 believed the conduct was lawful.” Id. Thus, “an official is denied qualified immunity only if the law was
17 clearly established and a reasonable official could not have believed the conduct was lawful.” Id.

18 The above inquiry “generally turns on the ‘objective legal reasonableness’ of the action, assessed in
19 light of the legal rules that were ‘clearly established’ at the time it was taken.” Grossman v. City of
20 Portland, 33 F.3d 1200, 1208 (9th Cir. 1994) (citing Anderson v. Creighton, 483 U.S. 635, 639 (1987)).
21 To defeat a claim of qualified immunity, the unlawfulness of the state official’s conduct must be
22 “apparent.” Id. (citing Anderson, 483 U.S. at 640). This standard “‘gives ample room for mistaken
23 judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’” Hunter
24 v. Bryant, 502 U.S. 224, 229 (1991) (citation omitted); Jeffers v. Gomez, 267 F.3d 895, 910 (9th Cir.
25 2001). Such an “accommodation for reasonable error” has been made “because ‘officials should not err
26 always on the side of caution’ because they fear being sued.” Hunter, 502 U.S. at 229 (citation omitted).

27
28 1984), is misplaced as well, as that case, which involved an allegation that a prison guard was ordered by his superiors to injure
the plaintiff in retaliation for filing lawsuits, is distinguishable on its facts. Id. at 781. Here, no such “requisite causal connection”
between either defendant Feld or defendant Frice and their superiors has been made, or even alleged. Id. at 783-84.

1 A. Plaintiffs' Unlawful Arrest Claim

2 Defendants argue defendants Feld, Frice and Shaver are entitled to qualified immunity with respect
3 to plaintiffs' claim of unlawful arrest. They argue there was no unlawful arrest, because defendants Feld
4 and Frice had a reasonable suspicion that Mr. Allen violated the conditions of his sentence. Plaintiffs
5 counter that there are genuine issues of material fact as to whether defendant Feld and defendant Frice acted
6 reasonably in their decision to arrest Mr. Allen.¹⁰ Even viewing the evidence in the record in the light most
7 favorable to plaintiffs, however, the Court finds no genuine issues of material fact here. As such, the Court
8 further finds plaintiffs have failed to sufficiently allege the deprivation of a constitutional right.

9 In general, "citizens enjoy the right not to be seized or arrested absent probable cause." Knox v.
10 Smith, 342 F.2d 651, 657 (7th Cir. 2003). Those subject to parole or probation, however, "have a more
11 limited liberty interest than ordinary citizens."¹¹ Id. (citing Morrissey v. Brewer, 408 U.S. 471, 480 (1972)
12 ("Revocation [of parole] deprives an individual, not of the absolute liberty to which every citizen is entitled,
13 but only of the conditional liberty properly dependant on observance of special parole restrictions.)); see
14 also United States v. Knights, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that
15 probationers 'do not enjoy the absolute liberty to which every citizen is entitled.')" (citation and internal
16 quotation marks omitted).

17 This more limited liberty interest on the part of parolees and probationers is because, as the
18 Supreme Court has stated:

19 The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a
20 search is determined "by assessing, on the one hand, the degree to which it intrudes upon
21 an individual's privacy and, on the other, the degree to which it is needed for the
22 promotion of legitimate governmental interests."

23 Knights, 534 U.S. at 118-19 (citation omitted). "In assessing the governmental interest side of the balance,"

24 ¹⁰As noted above, defendants Feld and Frice both state in their declarations and testified in their depositions that it was
25 their decision to arrest Mr. Allen. Also as noted above, defendant Shaver indicated in his deposition testimony that it was
26 defendant Frice who wanted to make sure that Mr. Allen was arrested. Plaintiffs have not alleged the decision to arrest Mr. Allen
27 was anyone's other than defendants Feld and Frice. Thus, the determination as to whether defendant Shaver is entitled to
28 qualified immunity in regard to plaintiffs' unlawful arrest claim, necessarily rests on the determination regarding defendants Feld
and Frice.

¹¹Although the terms "parole," "probation" and "community supervision" have different legal connotations, for purposes
of Fourth Amendment analysis regarding plaintiffs' unlawful arrest claim, those terms generally are treated as one and the same,
and thus they, along with the terms "parolee" and "probationer," shall be used interchangeably herein. See, e.g., State v. Massey,
81 Wn. App. 198 (1996).

1 furthermore, “it must be remembered that ‘the very assumption of the institution of probation’ is that the
 2 probationer ‘is more likely than the ordinary citizen to violate the law.’” Id. at 120 (citation omitted). The
 3 government’s “interest in apprehending violators of the criminal law, thereby protecting potential victims of
 4 criminal enterprise, may therefore justifiably focus on probationers in a way that it does not on the ordinary
 5 citizen.” Id. at 121; see also Knox, 342 F.3d at 657.

6 As such, the seizure of a parolee or probationer “requires something less than probable cause to be
 7 reasonable under the Fourth Amendment.” Knox, 342 F.3d at 657. Rather, “the balance” of considerations
 8 set forth above “requires no more than reasonable suspicion to conduct” a search or seizure of a parolee or
 9 probationer. Knights, 534 U.S. at 121. As the Supreme Court in Knights went on to state:

10 The degree of individualized suspicion required of a search is a determination of when
 11 there is a sufficiently high probability that criminal conduct is occurring to make the
 12 intrusion on the individual's privacy interest reasonable. . . . Although the Fourth
 13 Amendment ordinarily requires the degree of probability embodied in the term “probable
 14 cause,” a lesser degree satisfies the Constitution when the balance of governmental and
 15 private interests makes such a standard reasonable. . . . Those interests warrant a lesser
 16 than probable-cause standard here. When an officer has reasonable suspicion that a
 17 probationer subject to a search condition is engaged in criminal activity, there is enough
 18 likelihood that criminal conduct is occurring that an intrusion on the probationer's
 19 significantly diminished privacy interests is reasonable.

20 Id. (“The same circumstances that lead us to conclude that reasonable suspicion is constitutionally
 21 sufficient also render a warrant requirement unnecessary.”).

22 A probation search is constitutionally permissible if it is “conducted pursuant to a state law that
 23 satisfies the Fourth Amendment’s reasonableness standard.” United States v. Conway, 122 F.3d 841, 842
 24 (9th Cir. 1997); United States v. Garcia-Cruz, 978 F.2d 537, 541 (9th Cir. 1992) (parole search proper if
 25 conducted in manner consistent with state law). Under Washington statutory law: “[i]f there is reasonable
 26 cause to believe that an offender has violated a condition or requirement of the sentence, an offender may be
 27 required to submit to a search and seizure of the offender’s person, residence, automobile, or other personal
 28 property.” RCW 9.94A.631; see also RCW 9.94A.740(1) (community corrections officer may suspend
 offender’s community placement or community custody and arrest and detain him or her, if “reasonable
 cause” exists to believe offender has violated condition of such placement or custody).¹²

¹²“A violation of a condition of community placement or community custody shall be deemed a violation of the sentence for purposes of RCW 9.94A.631. The authority granted to community corrections officers under this section shall be in addition to that set forth in RCW 9.94A.631.” RCW 9.94A.970(1).

1 The term “reasonable cause” has been defined by the Washington State Court of Appeals to mean “a
2 well-founded suspicion that a [probation] violation has occurred.” Conway, 122 F.3d at 842 (quoting
3 Massey, 81 Wn. App. at 200); see also State v. Lucas, 56 Wn. App. 236, 243 (1989). Reasonable cause or
4 suspicion “is a legal conclusion based upon the particular circumstances of a given case.” Massey, 81 Wn.
5 App. at 201. The Ninth Circuit has noted the Washington statutory language’s “similarity” to Wisconsin’s,
6 which was considered by the Supreme Court in Griffin v. Wisconsin, 483 U.S. 868 (1987). Conway, 122
7 F.3d at 842 (Washington statute’s similarity to Wisconsin’s dictates result).

8 In Griffin, the Supreme Court held that a police search of a probationer’s residence that was based
9 on information received from a confidential informant was “‘reasonable’ within the meaning of the Fourth
10 Amendment because it was conducted pursuant to a valid regulation governing probationers.” Id. at 880. In
11 so holding, the Supreme Court further held in relevant part that:

12 [B]ecause it is the very assumption of the institution of probation that the probationer is
13 in need of rehabilitation and is more likely than the ordinary citizen to violate the law, we
14 think it enough if the information provided indicates . . . only the likelihood . . . of facts
justifying the search.

15 Id. Other federal and state decisions are instructive as well.

16 As in Washington, under California law, “a parole agent may search the residence of a parolee if he
17 has a reasonable suspicion that the ‘parolee is again involved in criminal activity, . . . and that the search
18 may turn up evidence of that activity.’” Garcia-Cruz, 978 F.2d at 541 (citation omitted). The Ninth Circuit
19 noted without disapproval the California state courts’ requirement that for such searches to be proper, “[t]he
20 suspicion must ‘be based on articulable facts which together with rational inferences from those facts
21 warrant objectively reasonable suspicion.’” Id. (citation omitted).

22 Here, defendants have presented “articulable facts” from which they state defendants Feld and Frice
23 based their decision to arrest Mr. Allen. In addition, the “rational inferences” that could have been drawn
24 therefrom, warranted an “objectively reasonable suspicion” that a violation had occurred. First, Mr. Allen
25 admitted on the October 8, 2003 polygraph examination pre-test interview that he peeped on his neighbor
26 and looked at pornography on the internet. This, as defendants point out, “provided objective evidence that
27 led to a reasonable suspicion” he had “engaged in prohibited activity.” Defendants’ Reply Memorandum in
28 Opposition to Plaintiffs’ Response (“Defendants’ Reply”), p. 3-4 (Dkt. #40). While Mr. Allen denies he
ever used the words “peep,” “peeping” or “peeped,” such denial does not do away with the fact that

1 defendants had the right to reasonably rely on the report of Mr. Yunck, an independent and uninterested
2 expert.

3 Even if one takes into account at face value, as plaintiffs would have the Court do, the fact that, as
4 noted above, a number of Mr. Allen's pre-test interview questions were contradictory or ambiguous – for
5 example, Mr. Allen's statements that his looking at his neighbor was not a peeping experience to him and
6 that he "got away" before it became one – reasonable suspicion was established here. Although, as noted
7 above, reasonable suspicion must be based on articulable facts and rational inferences, this requires merely
8 that defendants "be able to articulate something more than an 'inchoate and unparticularized suspicion'" or
9 "hunch." United States v. Sokolow, 490 U.S. 1, 7 (1999) (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)).

10 Thus, the fact that Mr. Allen's pre-test interview answers indicated that he may have been engaging in
11 activity similar to or constituting the crime for which he was convicted was sufficient here. That is, based
12 on those answers, defendants Feld and Frice rationally could have inferred that Mr. Allen had violated the
13 conditions of his sentencing and supervision.

14 The same thing is true with respect to what Mr. Yunck recorded Mr. Allen as stating concerning his
15 alleged use of his computer to search for pornography on the internet. That is, while Mr. Allen stated that
16 he was tempted to but did not "scan for sexual things on the computer" and did not do anything else when
17 he knew it was wrong to do, he also was recorded as having stated that he did look at pornography on the
18 computer, including "still pictures of naked adult females showing their breasts." Again, the fact that this
19 latter statement – though certainly contradictory to some extent with the other answers he also provided –
20 indicated Mr. Allen had viewed specific pornographic images on the internet, constitutes something more
21 than a mere inchoate and unparticularized suspicion or hunch.

22 The fact that it may have been later determined by a forensic analysis that Mr. Allen did not access
23 pornography on his computer, however, is not relevant to the determination of reasonableness here. See
24 Conway, 122 F.3d at 843 ("Washington law does not require that the search be necessary to confirm the
25 suspicion of impermissible activity.").¹³ That is, such information was not available to defendants Feld or
26

27 ¹³For the same reason, the fact that Mr. Allen ultimately was found by the Clark County Superior Court not to have
28 violated his sentencing conditions by peeping on his neighbor, cannot be relied on to show that defendants Feld and Frice were
unreasonable in suspecting that he had engaged in conduct similar to that for which he was originally convicted. So too will lack
of reasonable suspicion not be found merely on the basis that none of the defendants present during the search and seizure of Mr.
Allen checked to see if it was possible to peep on Mr. Allen's neighbor as described in the pre-test interview report. Indeed, at

1 Frice, as that analysis was not completed until October 27, 2003, two weeks after defendant Frice received
2 Mr. Yunck's report and ten days after the decision to arrest Mr. Allen was made. See Plaintiff's Statement,
3 Exhibit Z. Even if defendants Feld and Frice had obtained the forensic analysis earlier, furthermore, it
4 likely merely would have confirmed their suspicions, as it shows Mr. Allen tried to access a pornographic
5 website on October 13, 2003, five days after his pre-test interview was conducted. See id.

6 Plaintiff further argues it was not reasonable for defendant Feld and defendant Frice to have relied
7 on Mr. Allen's pre-test interview answers, because defendant Feld lacked proper training and background in
8 the conduct and use of polygraph examinations. That fact, plaintiffs assert, along with the inconsistencies
9 contained in the pre-test interview transcript noted above, and the fact that Mr. Allen was found to not have
10 attempted deception in answering "no" to the questions of whether he had deliberately peeped on anyone or
11 engaged in other illegal sexual activity, should have put defendant Feld on notice that further investigation
12 might be needed before commencing an arrest.

13 As defendants point out, however, there is no requirement that a parole, probation or community
14 corrections officer must engage in fact-finding or conduct any further investigation to confirm what actually
15 happened prior to arresting an offender on community supervision. Indeed, plaintiffs have cited to no legal
16 authority finding there to be such a requirement. It certainly may be true that there was no indication of
17 non-compliance with Mr. Allen's conditions of community supervision in his DOC and treatment records
18 prior to the October 8, 2003 pre-test interview. See, e.g., Feld Declaration, Exhibit G, p. 2; Plaintiffs'
19 Statement, Exhibit D). The fact is, however, given the nature of the crime for which he was sentenced, the
20 "high risk offender" status he was designated with, and the potential liability DOC faced by not acting in a
21 prompt manner, Mr. Allen's pre-test interview answers reasonably resulted in defendant Feld and defendant
22 Frice suspecting Mr. Allen had engaged in unlawful conduct.

23 Similarly, although defendant Frice may have erroneously believed that Mr. Allen had signed the
24 pre-test interview transcript, indicating he agreed with the recorded answers contained therein and therefore
25 had adopted them (see Plaintiffs' Statement, Exhibit B), this does not necessarily mean he would not have
26 sought Mr. Allen's arrest anyway or that he would have been unreasonable in doing so. Again, with or
27 without such a signed adoption, the pre-test interview answers themselves still provided a sufficient and
28

that point the search and seizure had already been effected.

1 articulable basis upon which defendants Feld and Frice could have formed a reasonable suspicion regarding
2 Mr. Allen's behavior.

3 The Court also rejects plaintiffs' inference that defendant Frice's alleged determination that Mr.
4 Allen be arrested no matter what and that defendant Feld not be talked out of arresting him, as evidenced by
5 defendant Shaver's deposition testimony, made that determination unreasonable or the arrest unlawful.
6 "With the limited exception of some special needs and administrative search cases," the Supreme Court has
7 "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual
8 officers." Knights, 534 U.S. at 122 (internal and external citations omitted); see also Anderson, 483 U.S. at
9 641 (law enforcement official's subjective beliefs irrelevant). Thus, defendant Frice's actual intent has no
10 bearing on the Court's analysis here.

11 Accordingly, this Court finds that defendants had a reasonable suspicion that Mr. Allen had violated
12 the conditions of his sentence, and that there was no violation of Mr. Allen's constitutional rights under the
13 Fourth Amendment. In light of the fact there has been no constitutional violation, the issue of qualified
14 immunity does not arise here.

15 B. Plaintiffs' Excessive Use of Force Claim

16 To determine whether the force used by law enforcement officials "to effect a particular seizure is
17 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the
18 intrusion on the individual's Fourth Amendment interests' against the countervailing governmental
19 interests at stake." Graham at 396 (quoting Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting United
20 States v. Place, 462 U.S. 696, 703 (1983))). This "balancing of competing interests" has been described as
21 "the key principle of the Fourth Amendment." Garner, 471 U.S. at 8 (quoting Michigan v. Summers, 452
22 U.S. 692, 700 n.12 (1981)). Since one of the factors in determining whether a particular use of force is
23 excessive "is the extent of the intrusion, . . . reasonableness depends on not only when a seizure is made,
24 but also how it is carried out." Id.; see also Graham, 490 U.S. at 395.

25 A claim of excessive use of force is "properly analyzed under the Fourth Amendment's 'objective
26 reasonableness' standard." Graham, 490 U.S. at 388. This inquiry, furthermore, "is one of 'objective
27 reasonableness' under the circumstances." Id. at 399. Thus, "the question is whether the officers' actions
28 are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their
underlying intent or motivation." Id. at 397. "[P]roper application" of the test of reasonableness "requires

1 careful attention to the facts and circumstances of each particular case, including the severity of the crime at
2 issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is
3 actively resisting arrest or attempting to evade arrest by flight.” Id. at 396; Garner, 471 U.S. at 8-9 (question
4 is whether totality of circumstances justifies particular type of seizure).

5 Whether a particular use of force is reasonable “must be judged from the perspective of a reasonable
6 officer on the scene, rather than with the 20/20 vision of hindsight.” Graham, 490 U.S. at 396 (“[T]he . . .
7 standard of reasonableness at the moment applies.”). In addition, the Court’s “calculus of reasonableness
8 must embody allowance for the fact that police officers are often forced to make split-second judgments – in
9 circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in
10 a particular situation.” Id. at 396-97. Further, it has been long recognized that the right of law enforcement
11 officials “to make an arrest or investigatory stop necessarily carries with it the right to use some degree of
12 physical coercion or threat thereof to effect it.” Id. at 396.

13 As discussed above, the parties are in disagreement as to whether defendant Shaver actually drew
14 his gun during the arrest of Mr. Allen. As this issue goes to the heart of plaintiffs’ excessive use of force
15 claim, there obviously is a genuine issue of material of fact here. Nevertheless, defendants argue that, even
16 accepting Mr. Allen’s version of what happened – i.e., that defendant Shaver briefly drew his weapon, held
17 it down and partially behind plaintiff AA, and then holstered it prior to arresting him – those facts do not
18 amount to an excessive use of force. While the Court finds that there is a material issue of fact as to
19 whether such action constitutes excessive use of force under the Fourth Amendment, plaintiffs have not
20 shown, for the purposes of qualified immunity analysis, that it would have been unreasonable for defendant
21 Shaver to have believed such action was lawful.

22 That there are genuine issues of material fact as to whether defendant Shaver actually drew his gun,
23 and whether doing so constituted the excessive use of force, is merely the first step in determining whether
24 defendant Shaver is entitled to qualified immunity. Rather, he also must have had an unreasonable belief
25 that such conduct was lawful. As the Supreme Court has stated in explaining this distinction:

26 If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back,
27 for instance, the officer would be justified in using more force than in fact was needed.

28 The qualified immunity inquiry, on the other hand, has a further dimension. The concern
of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the
legal constraints on particular police conduct. It is sometimes difficult for an officer to
determine how the relevant legal doctrine, here excessive force, will apply to the factual

1 situation the officer confronts. An officer might correctly perceive all of the relevant
2 facts but have a mistaken understanding as to whether a particular amount of force is
3 legal in those circumstances. If the officer's mistake as to what the law requires is
4 reasonable, however, the officer is entitled to the immunity defense.

5 Saucier, 533 U.S. at 206.

6 Qualified immunity, therefore, "operates . . . to protect officers from the sometimes 'hazy border
7 between excessive and acceptable force,' . . . and to ensure that before they are subjected to suit, officers are
8 on notice their conduct is unlawful." Id. (internal citation omitted). As the Supreme Court went on to state:

9 The deference owed officers facing suits for alleged excessive force is not different in
10 some qualitative respect from the probable-cause inquiry . . . Officers can have
11 reasonable, but mistaken, beliefs as to the facts establishing the existence of probable
12 cause or exigent circumstances, for example, and in those situations courts will not hold
13 that they have violated the Constitution. Yet, even if a court were to hold that the officer
14 violated the Fourth Amendment by conducting an unreasonable, warrantless search,
15 Anderson v. Creighton, 483 U.S. 635 (1987)] still operates to grant officers immunity
16 for reasonable mistakes as to the legality of their actions.

17 Id.; see also Anderson, 483 U.S. at 641 ("We have recognized that it is inevitable that law enforcement
18 officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have
19 indicated that in such cases those officials – like other officials who act in ways they reasonably believe to
20 be lawful – should not be held personally liable").

21 In the context of law enforcement, "[t]he doctrine of qualified immunity assumes that police officers
22 do not knowingly violate the law." Gasho v. U.S., 39 F.3d 1420, 1438 (9th Cir. 1994). As such, a police
23 officer "is presumed to be immune from any damages caused by his constitutional violation." Id. This
24 presumption may be rebutted, but "[t]he plaintiff bears the burden of showing that the constitutional right
25 allegedly violated was clearly established 'before the defendant acted or failed to act.'" Casteel v. Pieschek,
26 3 F.3d 1050, 1053 (7th Cir. 1993); see also Brewster v. Board of Education, 149 F.3d 971, 977 (9th Cir.
27 1998); Saucier, 533 U.S. at 208 ("The question is what the officer reasonably understood his powers and
28 responsibilities to be, when he acted, under clearly established standards."). To rebut this presumption,
29 plaintiff must "offer either a closely analogous case or evidence that the defendants' conduct is so patently
30 violative of the constitutional right that reasonable officials would know without guidance from the courts."
31 Casteel, 3 F.3d at 1053.

32 To preclude qualified immunity, however, "it is not necessary that 'the very action in question has
33 previously been held unlawful,' or that the plaintiff 'point to a previous case that differs only *trivially* from

1 his case.” Pierce, 117 F.3d at 882 (emphasis in original) (internal and external citations omitted). The facts
 2 of the prior case though, “do need to be *materially* similar.” Id. (emphasis in original) (citation omitted);
 3 Conner v. Reinhard, 847 F.2d 384, 388 (7th Cir. 1988) (case law in closely analogous area is essential to
 4 permit court to conclude constitutional right was clearly established at time of alleged violation). Further,
 5 as noted above, “the egregiousness and outrageousness of certain conduct may suffice to obviously locate it
 6 within the area proscribed by a more general constitutional rule.” Pierce, 117 F.3d at 882; see also Sweaney
 7 v. Ada County, 119 F.3d 1385, 1389 (9th Cir. 1997) (“The absence of any authority directly on point is not
 8 fatal to a section 1983 claim. A right is clearly established ‘[i]f the only reasonable conclusion from
 9 binding authority were that the disputed right existed.’”) (internal and external citations omitted).

10 Plaintiffs correctly assert there are issues of material fact as to whether defendant Shaver drew his
 11 gun and whether it was an excessive use of force to do so. Thus, plaintiffs argue defendants motion should
 12 not be granted, because “[t]he determination of whether a reasonable officer could have believed his
 13 conduct was lawful is a determination of law that can be decided on summary judgment only if the material
 14 facts are undisputed.” Plaintiffs’ Response, p. 4 (citing LaLonde v. County of Riverside, 204 F.3d 947, 953
 15 (9th Cir. 2000)); see also Thompson v. Mahre, 110 F.3d 716, 719 (9th Cir. 1997) (“[W]here there is a
 16 genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of
 17 summary judgment . . . require submission to a jury.”). However, the “issues of disputed fact,” must be
 18 ones on which “the question of immunity turns.” Conner, 847 F.2d at 388.

19 Indeed, the Supreme Court has rejected the proposition that summary judgment should be denied
 20 “any time a material issue of fact remains” with respect to the underlying constitutional violation claim, as
 21 this “could undermine the goal of qualified immunity.”¹⁴ Saucier, 533 U.S. at 202-04 (noting inquiries for
 22 qualified immunity and excessive force remain distinct); see also Anderson, 483 U.S. 635 (1987) (rejecting
 23 argument that there is no distinction between reasonableness standard for warrantless searches and qualified
 24 immunity inquiry). That is, just because an officer may have a mistaken understanding regarding the facts
 25 supporting the reasonableness of a particular use or level of force, does not necessarily mean any mistake in
 26 believing his or her actions to be lawful was itself unreasonable. Thus, in addition to showing that there is a
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28 ¹⁴ “[T]o ‘avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.’” Saucier, 533 U.S. at 202 (citation omitted).

1 genuine issue of material fact as to whether a constitutional right was violated, plaintiffs also must show that
2 right was clearly established at the time of the alleged violation.¹⁵ Saucier, 533 U.S. at 201.

3 To make this additional showing though, it “is not enough” to establish that an arrest or use of force
4 was “contrary to the Fourth Amendment . . . under objective standards of reasonableness.” Id. Rather, the
5 right the law enforcement official “is alleged to have violated:

6 [M]ust have been ‘clearly established’ in a more particularized, and hence more relevant,
7 sense: The contours of the right must be sufficiently clear that a reasonable official would
8 understand that what he is doing violates that right.” . . . The relevant, dispositive inquiry
in determining whether a right is clearly established is whether it would be clear to a
reasonable officer that his conduct was unlawful in the situation he confronted.

9 Id. at 202 (internal and external citations omitted); Brewster, 149 F.3d at 977 (“[P]ublic officials must be
10 given clear notice that their conduct is unlawful.”). Thus, “[i]f the law did not put the officer on notice that
11 his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.”
12 Saucier, 533 U.S. at 202; Conner, 847 F.2d at 388 (test for immunity is whether law was clear in relation to
13 specific facts confronting public official when he or she acted).

14 Plaintiffs argue defendant Shaver’s alleged use of his gun during the arrest of Mr. Allen constituted
15 an excessive use of force under the circumstances. Specifically, plaintiffs assert such use was contrary to
16 policies and procedures established by the DOC. However, “[o]fficials sued for constitutional violations do
17 not lose their qualified immunity merely because their conduct violates some statutory or administrative
18 provision.” Davis v. Scherer, 468 U.S. 183, 194 (1984); see also Elder v. Holloway, 510 U.S. 510, 515
19 (1994) (“[A]n official’s clear violation of a state administrative regulation does not allow a § 1983 plaintiff
20 to overcome the official’s qualified immunity.”). Thus, defendant Shaver’s alleged violation of any policy
21 or procedure of the DOC will not, in itself, be sufficient to deny qualified immunity on plaintiffs’ excessive
22 use of force claim.

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27 ¹⁵Plaintiffs also cite to the Ninth Circuit’s decision in Liston v. County of Riverside, 120 F.3d 965 (9th Cir. 1997), for
28 the proposition that “the reasonableness of force used is ordinarily a question of fact for the jury. Id. at 976 n.10 (noting, however,
that if district court concludes, after resolving all factual disputes in favor of plaintiff, defendant officers can still win on summary
judgment if use of force was objectively reasonable under circumstances). Once more, as in the unlawful arrest context, the mere
fact that an issue of material fact exists in regard to the underlying constitutional claim, does not alone mean defendants are not
entitled to qualified immunity on summary judgment.

1 Such a violation though may go to the reasonableness of defendant Shaver's actions.¹⁶ As discussed
2 above, pursuant to a DOC policy directive, all firearms carried by DOC staff are not to be used to effect an
3 arrest, unless a threat of great bodily harm or death is perceived. In addition, DOC staff are only to use the
4 level of force necessary to control a situation. Here, defendants have not alleged that use of a gun, or other
5 similar use of deadly force, was necessary to control the situation during the arrest of Mr. Allen or that a
6 threat of great bodily harm or death was perceived by defendant Shaver. Indeed, defendant Shaver himself
7 states in his declaration that he had no reason to believe Mr. Allen would resist arrest or present a risk of
8 flight. As such, if defendant Shaver did in fact take out his gun as plaintiffs allege, it is difficult to see that
9 an objective CCO would view such action as being reasonable in light of the express language of the DOC
10 directive noted above. See also Stough Declaration, ¶ 18.

11 Plaintiffs, however, have failed to come forth with a prior case that is closely analogous to the matter
12 at hand showing that Mr. Allen's right to be free from the type of use of force under facts similar to the ones
13 in this case was clearly established at the time of his arrest. At first glance it might appear that defendant
14 Shaver's alleged use of deadly force, i.e., a gun, was unreasonable on its face under Graham. That is, the
15 sentencing violation of which Mr. Allen was accused, though certainly not insignificant, was not one of
16 violence. In addition, Mr. Allen did not pose an immediate threat to the safety of defendants Feld, Frice or
17 Shaver or to the safety of others, nor was he actively resisting or attempting to evade arrest.

18 Plaintiffs have pointed to no Supreme or Circuit court case, nor has the Court found any, holding
19 that drawing a gun and then briefly pointing it at the ground constitutes an excessive use of force, even
20 where, as here, there was no immediate threat to safety or active attempt to resist or evade arrest. In the
21 Ninth Circuit, however, cases in which it has been found that the use of a gun by an officer constituted an
22 excessive use of force in such circumstances generally involved the situation where the officer had drawn
23 his gun and then aimed it at the plaintiff. See, e.g., Tekle v. United States, 457 F.3d 1088, 1095 (9th Cir.
24 2006) (gun pointed at head of non-resisting, unarmed eleven year-old boy lying face-down in driveway);
25 Motley v. Parks, 432 F.3d 1072, 1089 (9th Cir. 2005) (weapon kept trained on infant); Robinson v. Solano

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28 ¹⁶The question of "reasonableness" in this instance is concerned solely with the issue of whether a constitutional violation, i.e., excessive use of force, had occurred. It does not go to, and thus is entirely separate from, the next step in the qualified immunity analysis process, i.e., the issue of whether defendant Shaver's belief that his alleged use of force was reasonable.

1 Co., 278 F.3d 1007, 1013-15 (9th Cir. 2001) (gun drawn at close range and pointed at head of unarmed and
 2 handcuffed suspect) (citing Petta v. Rivera, 143 F.3d 895, 905 (5th Cir. 1998) (cocked gun brandished in
 3 front of civilian's face)).

4 When determining whether use of a gun by law enforcement officials is excessive, at least during an
 5 investigatory stop, the courts "must look at the intrusiveness of all aspects of the incident in the aggregate."
 6 Robinson, 278 F.3d at 1015. The Ninth Circuit has stated that "[u]nder ordinary circumstances, when the
 7 police have only reasonable suspicion to make an investigatory stop, drawing weapons and using handcuffs
 8 and other restraints will violate the Fourth Amendment." Washington v. Lambert, 98 F.3d 1181, 1187 (9th
 9 Cir. 1996). The Court of Appeals, however, made clear that in referring to "drawing weapons," it meant
 10 "pointed" weapons:

11 [I]f the police draw their guns it greatly increases the seriousness of the stop. . . . The
 12 significance of the pointed gun is that it makes the encounter far more frightening than if
 13 the officer's gun remains holstered, or even drawn but pointed down at his side; and
 certainly where the danger of the encounter to the officer, though potentially serious, is
 not clear and present, the deliberate pointing of a gun at the suspect is problematic.

14 Id. at 1188-89 (emphasis added). Accordingly, viewing the context of this case as a whole, and the facts in
 15 the light most favorable to plaintiffs, it was not clearly established at the time of the events in question that
 16 even if defendant Shaver had taken his gun out of his holster and briefly pointed it at the ground, this would
 17 constitute an excessive use of force during the arrest of Mr. Allen. Defendant Shaver is therefore entitled to
 18 qualified immunity.

19 V. Plaintiffs Lisa Allen, AA, CA and SA Cannot Assert a Claim Under the Fourteenth Amendment

20 Plaintiffs Lisa Allen, AA, CA and SA claim the defendants' actions deprived them of their "liberty
 21 relationship with" Mr. Allen. Plaintiffs' First Amended Complaint, p. 2. Defendants argue those plaintiffs
 22 lack standing to sue for compensation under section 1983 for any injuries they allegedly suffered due to Mr.
 23 Allen's claimed violation of his constitutional rights. In response, plaintiffs assert there is a genuine issue
 24 of material fact as to whether defendants' conduct violated the due process rights of Lisa Allen, AA, CA and
 25 SA. The Court, however, finds plaintiffs' argument to be without merit.

26 The "cause of action for deprivation of civil rights" created by section 1983 "is an action *personal*
 27 to the injured party," as the language of the statute itself only "grants the cause of action 'to the party
 28 injured.'" Jaco v. Bloechle, 739 F.2d 239, 241 (6th Cir. 1984) (emphasis in original); Estate of Amos v. City
of Page, 257 F.3d 1086, 1093 (9th Cir. 2001) (party bringing discrimination action under section 1983 must

1 assert own rights and interests, not those of third parties); Claybrook v. Birchwell, 199 F.3d 350, 357 (6th
2 Cir. 2000) (“[A] section 1983 cause of action is entirely personal to the direct victim of the alleged
3 constitutional tort.”). “Accordingly, only the purported victim, or his estate’s representative(s), may
4 prosecute a section 1983 claim.” Claybrook, 199 F.3d at 357. In other words, “no cause of action may lie
5 under section 1983 for emotional distress, loss of a loved one, or any other consequent collateral injuries
6 allegedly suffered personally by the victim’s family members.” Id.

7 Thus, for example, federal courts have held that section 1983 “does not reach” the claim for loss of
8 consortium made by the spouse of a plaintiff who brings a cause of action for violation of his or her civil
9 rights, because such a claim “does not represent an injury based on a deprivation of” the spouse’s “rights,
10 privileges or immunities secured by federal law.” Stallworth v. City of Cleveland, 893 F.2d 830, 838 (6th
11 Cir. 1990); see also Meaney v. Dever, 170 F.Supp.2d 46, 64 (D.Mass. 2001) (“A spouse of a federal civil
12 rights victim is not permitted to raise a separate ancillary cause of action for loss of consortium based solely
13 upon the federal civil rights violation.”), *reversed and remanded on other grounds by Meaney v. Dever*,
14 326 F.3d 283 (1st Cir. 2003); Quitmeyer v. Southeastern Pennsylvania Transp. Authority, 740 F.Supp. 363,
15 370
16 (E.D.Pa. 1990) (no authority to permit spousal recovery for loss of consortium based on violations of other
17 spouse’s civil rights).

18 While plaintiffs allege a violation of Lisa Allen’s constitutionally protected due process rights, they
19 do not identify, with any specificity, what those rights are. If plaintiffs are alleging loss of consortium with
20 Mr. Allen for the short time he was in custody, such right is not recognized as it is collateral to Mr. Allen’s
21 section 1983 claim. Defendants therefore are entitled to an order dismissing plaintiffs’ claim that there was
22 a violation of Lisa Allen’s federally protected constitutional rights.

23 Plaintiffs Lisa Allen, AA, CA and SA argue, however, that they are entitled to bring separate due
24 process claims under the Fourteenth Amendment in light of the recognized inherent liberty interests in
25 companionship between a parent and his or her children. To support their argument, plaintiffs rely on the
26 Ninth Circuit’s holding in Curnow v. Ridgecrest Police, 952 F.2d 321 (9th Cir. 1991), which involved a
27 lawsuit brought under section 1983 by the estate, parents and children of an individual who was killed by a
28 police officer using deadly force during the course of an arrest. Id. at 322-24. In that case, the Court of
Appeals stated as follows:

1 While the person who claims excessive force was directed at him or her can only raise a
 2 fourth amendment claim, a parent who claims loss of the companionship and society of
 3 his or her child, or vice versa, raises a different constitutional claim. The Ninth Circuit
 4 recognizes that a parent has a constitutionally protected liberty interest under the
 5 Fourteenth Amendment in the companionship and society of his or her child, . . . and that
 6 a “child’s interest in her relationship with a parent is sufficiently weighty by itself to
 7 constitute a cognizable liberty interest.” . . . Thus, *Graham v. Connor* does not bar the
 8 parents’ and children’s due process claims.

9 Id. at 325 (internal citations omitted). Therefore, plaintiffs argue here, that while Lisa Allen, AA, CA and
 10 SA themselves may not bring a claim for civil damages under section 1983 based on excessive use of force
 11 under the Fourth Amendment, Curnow allows them to do so under the Fourteenth Amendment for loss of
 12 companionship.

13 Clearly, as indicated by the Ninth Circuit’s decision in Curnow, this appears to be true at least with
 14 respect to the claims of plaintiffs AA, CA and SA. The “constitutional interest in familial companionship
 15 and society logically extends to protect children from unwarranted state interference with their relationships
 16 with their parents.” Smith v. City of Fontana, 818 F.2d 1411, 1418 (9th Cir. 1987). Likewise, “parents can
 17 challenge under section 1983 a state’s severance of a parent-child relationship as interfering with their
 18 liberty interests in the companionship and society of their children.” Id. It further appears though, that such
 19 a right has not yet been extended to the relationship between husband and wife. See id. (noting that
 20 Supreme Court has yet to address whether government’s act of taking life of one family member deprives
 21 every other family member of cognizable liberty interest in continued association with decedent).

22 Regardless, neither Lisa Allen nor any of the Allen children have demonstrated that there has been
 23 any “unwarranted” state interference in their relationships with Mr. Allen on the part of defendants. As
 24 explained above, plaintiffs have failed to show the arrest of Mr. Allen was unlawful. In addition, while
 25 there is a dispute as to whether defendant Shaver drew his gun and whether the manner in which he did so
 26 constituted excessive use of force, no showing has been made that such an alleged constitutional violation
 27 actually interfered with any liberty interest here.

28 CONCLUSION

Defendants have met their burden of demonstrating that they are entitled to judgment as a matter of
 law on plaintiffs’ federal claims brought pursuant to section 1983. Specifically, plaintiff Trevor Allen has
 failed to allege valid Fifth, Eighth and Fourteenth Amendment claims, plaintiffs’ claims against the State of
 Washington are barred by the Eleventh Amendment, defendants Shelley Feld, Jeff Frice and Anthony

1 Shaver are entitled to qualified immunity, and plaintiffs Lisa Allen, AA, CA and SA have failed to allege
2 valid substantive due process claims under the Fourteenth Amendment. Accordingly, defendants' motion
3 for summary judgment (Dkt. #30) hereby is GRANTED, and plaintiffs' federal claims brought pursuant to
4 section 1983 hereby are DISMISSED.¹⁷

5 DATED this 24th day of October, 2006.

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8 Karen L. Strombom
9 United States Magistrate Judge
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¹⁷In addition, as noted above, plaintiffs' motion for a continuance of the noting date for consideration of defendants' motion for summary judgment (Dkt. #32) hereby is GRANTED.